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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1185

FIRESTONE PLASTICS COMPANY, a Division of THE FIRESTONE TIRE & RUBBER COMPANY, UNION CARBIDE CORPORATION

and

THE SOCIETY OF THE PLASTICS INDUSTRY, INC.
Petitioners,

v.

UNITED STATES DEPARTMENT OF LABOR, JOHN T. DUNLOP, Secretary, U. S. Department of Labor and JOHN H. STENDER, Assistant Secretary of Labor for Occupational Safety and Health,

and

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND INDUSTRIAL UNION DEPARTMENT, AFL-CIO

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

This brief *amicus* is filed by the Chamber of Commerce of the United States of America with the consent of the parties as provided for in Rule 42(2) of the Rules of this Court.*

* Consents of all parties to the Chamber's participation have been filed with this Court.

I.

INTEREST OF THE AMICUS CURIAE.

The Chamber of Commerce of the United State of America (hereinafter "Chamber") is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 46,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important matters vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of litigation before this Court.*

The Chamber files this brief, *amicus curiae,* to present its views upon a case of great importance in the administration of the Occupational Safety and Health Act of 1970, 28 U.S.C. § 651, *et seq.,* which has not

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* E.g., Howard Johnson Company Inc. v. Detroit Local Joint Executive Board, No. 73-631 (1974); Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz v. Lloyd W. McCorkle, et al., No. 72-1554 (1974); Marco DeFunis and Betty DeFunis, his wife; Marco DeFunis, Jr. and Lucia DeFunis, his wife v. Charles Odegaard, President of the University of Washington, et al., No. 73-235 (1974); Corning Glass Works v. Brennan, No. 73-29; N.L.R.B. v. Bell Aerospace Company Division of Textron, Inc., No. 72-1598 (1974); Boys Markets v. Retail Clerks Union, 398 U.S. 235 (1970); N.L.R.B. v. The Boeing Company, et al., 412 U.S. 84 (1973); N.L.R.B. v. Granite State Joint Board, 409 U.S. 213 (1972); N.L.R.B. v. Burns Int'l Security Services, Inc., 405 U.S. 272 (1972); N.L.R.B. v. Pittsburgh Plate Glass Co., 404 U.S. 517 (1971); H. K. Porter Co. v. N.L.R.B., 397 U.S. 99 (1970).

been considered previously by this Court. The interest of the *amicus curiae* is predicated upon the far-reaching significance of this case and the devastating implications of the decision below upon the proper administration of the Act by the Assistant Secretary of Labor for Occupational Safety and Health (hereinafter "Assistant Secretary"). Although the instant case raises many significant issues, this brief will be confined to the important issues relating to the supervisory role of the Federal Courts of Appeals in reviewing actions of the Assistant Secretary in promulgating occupational safety and health standards.

II.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court Below Improperly Limits the Supervisory Role of Courts of Appeals Reviewing Occupational Safety and Health Standards Pursuant to the Substantial Evidence Test.

Section 6 of the Act (29 U.S.C. § 655) sets forth the procedure for the promulgation of safety and health standards. Provision for judicial review of standards adopted under this procedure is found in Section 6(f) (29 U.S.C. § 655(f)). This section provides that "[t]he determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole." It is settled that with respect to "informal rulemaking" proceedings, such as those conducted by the Assistant Secretary in this case,[1] that courts of appeals are required by the statute

[1] The Secretary of Labor has delegated all the statutory standard-setting authority granted by Section 6 of the Act to the Assistant Secretary of Labor for Occupational Safety and Health, whose decisions and determinations with respect to occupational safety and health standards are deemed final determinations of the Secretary for the purposes of the Act's judicial review provisions (29 CFR § 1910.4 (1974)).

to apply the substantial evidence test to "policy" determinations and decisions essentially "legislative" in character as well as factual issues resolved by the administrative agency.[2] *Associated Industries of New York State* v. *United States Department of Labor,* 487 F.2d 342, 348-49 (2d Cir. 1973); *Industrial Union Department, AFL-CIO* v. *Hodgson,* 499 F.2d 467, 473-75 (D.C. Cir. 1974); *Florida Peach Growers Ass'n* v. *United States Department of Labor,* 489 F.2d 120, 127-29 (5th Cir. 1974); *National Roofing Contractors Association* v. *Brennan,* 495 F.2d 1294, 1298-99 (7th Cir. 1974), *cert. denied,* — U.S. —, 92 L.Ed.2d 801, 95 S.Ct. 775 (1975).

The "uneasy partnership"[3] between the appellate courts and administrative agencies created by Congress' requirement that the substantial evidence stand-

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[2] The legislative history of Section 6(f) confirms conclusively that the substantial evidence test is to be applied to policy and factual determinations made by an administrative agency. Unlike other environmental legislation passed by Congress, which expressly provided for less rigorous standards of review by specifically limiting application of the test only to issues of fact, *e.g.,* Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 135b(d) (1970), Natural Gas Act, 15 U.S.C. § 717r(b) (1970), this Act's drafters were acutely aware of the necessity for rigorous judicial review of OSHA policy decisions primarily because no independent standards review board was provided for as part of the administrative procedure. See remarks of Congressman Steiger, chief House Sponsor of the bill which was eventually enacted, 116 Cong. Rec. 42206 (December 17, 1970). As noted by Judge Friendly in *Associated Industries of New York State* v. *United States Department of Labor,* 487 F.2d 342, 348-49 (2d Cir. 1973), the substantial evidence test was deliberately incorporated into the statute as an explicit compromise between differing House and Senate bills.

[3] The phrase is Judge Friendly's. See *Associated Industries of New York State* v. *United States Department of Labor,* 487 F.2d 342, 354 (2d Cir. 1973).

ard of review be applied does not permit the appellate courts completely to abdicate their responsibility for rigorous review of agency policy determinations. Yet, such abdication of its responsibility under the substantial evidence test is precisely what the court below did. Its misapplication of the test to the determinations of the Assistant Secretary not only violates the statutory mandate, but if followed by other courts of appeals, will result in almost total judicial deference to any determination characterized by the Assistant Secretary or a court as predominantly a "policy" determination or one essentially "legislative" in character.

In dealing with the policy choices with respect to the health hazards of vinyl chloride monomer exposure, the court below limited its analysis to reviewing only that portion of the record which supported the Assistant Secretary's decision to set the permissible exposure level of the new standard at what the court characterized as "the lowest detectable level" (Pet. App. 18a). Finding that the evidence relied on by the Assistant Secretary supported his choice of policy, the court took its analysis no further, thereby failing to fulfill its duty under the substantial evidence test. In its analysis, the Court refused to consider any of the substantial record evidence which contradicts the conclusions reached by the Assistant Secretary.

The substantial evidence test had its genesis in the practice of courts of appeals when reviewing decisions of the National Labor Relations Board of sustaining the Board's findings if supported by any record evidence, considered by itself and in isolation and without regard to the possible existence of contradictory evidence in the record. These appellate decisions led to protests against "shocking injustices" and

intimations of judicial abdication.[4] Mr. Justice Frankfurter, in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951), made it absolutely clear that the incorporation of the substantial evidence test into the judicial review provisions of the Labor Management Relations Act was designed to require the appellate courts to review and analyze contradictory evidence or evidence from which conflicting inferences could be drawn and to determine if that evidence renders the evidence relied upon by the agency insubstantial. It was no longer sufficient, Mr. Justice Frankfurter reasoned, for courts of appeals simply to ascertain whether any evidence in the record considered in isolation substantiated the Board's decision. "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight" (340 U.S. at 488).

Plainly, then, the decision of the court below did not apply the substantial evidence test, as articulated in *Universal Camera,* to the determinations of the Assistant Secretary. The lower court failed to "take into account whatever in the record fairly detracts from" the evidence presented by the Assistant Secretary.

The lower court's decision permits application of a standard of review which only requires the Assistant Secretary to show a minimal "rational basis" for the determination made.[5] Moreover, the decision below

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[4] See Mr. Justice Frankfurter's historical analysis of the judicial review provisions of the Labor Management Relations Act, 29 U.S.C. § 160(e) and (f) (1970), in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 478-79 (1951).

[5] This is similar to the standard of review ordinarily applied to legislation which only requires some rational basis for the action taken. See, *e.g.*, *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973); *Kotch* v. *Board of River Port Pilot Commissioners*, 330 U.S. 552 (1947).

calls for a less searching inquiry into the considerations underlying the Assistant Secretary's action than is required by the "arbitrary and capricious" standard of review—a less rigorous standard than the substantial evidence test. In *Ethyl Corporation* v. *EPA*, ———F.2d———(Slip Op. No. 73-2205) (D.C.Cir. Jan. 28, 1975), the Court of Appeals applied the "arbitrary and capricious" standard to regulations issued pursuant to the Clean Air Act (42 U.S.C. § 1857f-6c(c)(1)(A) (1970)). Yet, unlike the court below which purported to apply the substantial evidence test, the court in *Ethyl* fully analyzed the evidence contrary to that relied on by the Administrator and found the evidence relied on so wanting in comparison as to require invalidation of the regulations (Slip Op. No. 73-2205, Opinion of Court at 49ff). Clearly, the substantial evidence test requires as much, if not more, of a court of appeals when reviewing an OSHA standard.[6]

Consequently, whatever analysis or standard of review was applied by the court below, it is totally contrary to the requirements of the Act. Section 6(f) requires all determinations of the Assistant Secretary to be supported by substantial evidence on the record considered as a whole. By misapplying that test in the instant case, the lower court renders totally meaningless Section 6(b)(5) of the Act. That provision requires that standards dealing with toxic materials and substances or harmful physical agents be "based upon research, demonstrations, experiments, and such

[6] See also, *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415-17 (1971), where this Court required the appellate courts to engage in a much more searching inquiry into agency action under the "arbitrary and capricious" test than that in which the court below engaged using the more stringent "substantial evidence" test.

other information as may be appropriate." In addition, the Assistant Secretary is also to consider "the feasibility of the standard" in making determinations regarding standards. Of what use is the development of an extensive record before an administrative agency if appellate courts, in the manner of the court below, simply abdicate their responsibility and, in effect, rubber stamp the Administrator's actions?

The dangers inherent in such abdication by the appellate courts of their congressionally mandated supervisory role readily appear. A judicial rubber stamp allows the Assistant Secretary to exercise uncontrolled discretion to promulgate occupational safety and health standards that are without foundation in policy or fact. This is clearly contrary to Section 6(b)(5) of the Act which requires assessment of technological and economic feasibility considerations fundamental to the continued existence of business enterprises sought to be regulated.

The development of safety and health standards is a new role for the Labor Department, and its lack of experience in evaluating such considerations can be expected to produce erroneous conclusions concerning technological and economic feasibility, or even worse, as here, a total disregard of such matters. The substantial evidence test was incorporated into the Act's judicial review provisions to provide a check on just such administrative disregard of technological and economic considerations. Severe financial hardship and possible ruin for the small businessman and increased concentration of some industries, the necessary result of improper standards unchecked by proper judicial review, does not serve the best interests of the nation and may, indeed, conflict with other national

goals. It is imperative, therefore, that this Court act to correct the imbalance created by the decision of the court below.

2. Misapplication of the Substantial Evidence Test by the Court Below Conflicts with Decisions of Other Courts of Appeals.

The critical necessity that this Court review the decision below is further demonstrated by the fact that other courts of appeals, when reviewing determinations by the Assistant Secretary, have applied the substantial evidence test in the manner prescribed by Mr. Justice Frankfurter in *Universal Camera.* Therefore, the decision below not only violates the statute and encourages unchecked administrative discretion, but also conflicts with decisions of other courts of appeals by failing to undertake the analysis prescribed by *Universal Camera.*

In *Industrial Union Department, AFL-CIO* v. *Hodgson,* 499 F.2d 467 (D.C.Cir. 1974), the Court of Appeals for the District of Columbia reviewed the entire record and evaluated the evidence relied on by the Assistant Secretary including that which detracted from its weight and as a result remanded that portion of an asbestos exposure standard which required a uniform effective date for all segments of the asbestos industry. In remanding, the Court held that the Assistant Secretary, when promulgating the standard, failed to articulate why he elected to ignore and, in essence, rejected the record evidence showing inter-industry and intra-industry differences concerning the time needed by employers to meet the stand (499 F.2d at 480-81.

Florida Peach Growers Ass'n v. *United States Department of Labor,* 489 F.2d 120 (5th Cir. 1974), is

in conflict with the decision below because the court in that case reviewed not only the evidence relied upon by the Assistant Secretary but also the conflicting evidence and recommendations supplied by a Standards Advisory Committee and its Pesticides Subcommittee, convened by the Assistant Secretary pursuant to Section 7 of the Act, and an interagency Task Group on Occupational Exposure to Pesticides. Although the court indicated that the contrary recommendations and findings of the Assistant Secretary's investigators did not preclude him from issuing an emergency standard, it held that the determinations of the Assistant Secretary were not supported by substantial evidence, noting that the contrary recommendations rendered insubstantial the evidence relied upon by the Assistant Secretary (489 F.2d at 129; see also, 489 F.2d at 126-132).

In the present case the findings and recommendations of OSHA's own staff and independent consultants contradicted the Assistant Secretary's determination on the health hazards of vinyl chloride monomer exposure. This evidence should have been evaluated by the court below in ascertaining whether the evidence relied on by the Assistant Secretary was thereby rendered insubstantial. This evaluation was not made.

Finally, Judge Friendly, speaking for the Second Circuit in *Associated Industries of New York State* v. *United States Department of Labor*, 487 F.2d 342, 351-53 (2d Cir. 1973), applied the substantial evidence test in a manner inconsistent and contrary to that utilized by the panel below.[7] In that case, the court vacated

[7] Judge Friendly has elsewhere noted the difficulty of separating policy making from other kinds of administrative action. H. Friendly, *Benchmarks*, 79, 95, 112-13 (1967). Recent commentary has noted the need for the courts exercising judicial review of

the occupational safety and health standard establishing the minimum number of lavatories in industrial establishments. Engaging in the analysis mandated by *Universal Camera*, Judge Friendly evaluated the evidence contrary to that relied on by the Assistant Secretary and ruled that in light of such detracting evidence the policy choice made by the Assistant Secretary was not supported by substantial evidence on the record considered as a whole.[8]

Similarly, other courts of appeals applying the substantial evidence test to environmental legislation other than this Act have engaged in the analysis prescribed by *Universal Camera*. These courts, unlike the court below, have evaluated and reviewed the evidence relied on by an administrative agency to support a policy decision and have determined if that evidence was rendered insubstantial by contrary evidence detracting from its weight. *International Harvester Company* v. *Ruckelshaus*, 478 F.2d 615, 643-50 (D.C. Cir. 1973); *Chrysler Corporation* v. *United States Department of Transportation*, 472 F.2d 659, 671-80 (6th Cir. 1972).

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administrative action to examine closely scientific and other technical data relied on by an administrator in promulgating standards. Schotland, *Federal Judicial Review*, 29 Admin.L.Rev. 119, 126-27 (1974); Wright, *Court of Appeals Review of Federal Regulatory Agency Rulemaking*, 26 Admin.L.Rev. 199, 209-11 (1974).

[8] The Court of Appeals for the Third Circuit in *Synthetic Organic Chemical Manufacturers Ass'n* v. *Brennan*, 503 F.2d 1155 (3d Cir. 1974), *petition for cert. filed*, No. 74-789 (Dec. 21, 1974), recently also misapplied the substantial evidence test in a fashion similar to the decision below and in substantial conflict with a prior decision of the Third Circuit in *Dry Color Manufacturers Ass'n* v. *United States Department of Labor*, 486 F.2d 98 (3d Cir. 1973).

III.

CONCLUSION

For the foregoing reasons and for the reasons set forth by the Petitioners, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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